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August 29, 2019

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: Crown Castle Fiber LLC v. Commonwealth Edison Company
Proceeding Numbers 19-169 & 19-170
Bureau ID Numbers EB-19-MD-004 & EB-19-MD-005

Ms. Dortch:

Pursuant to 47 C.F.R. § 1.115(d), Crown Castle Fiber LLC submits the attached Opposition To Commonwealth Edison Company's Application For Review filed in the above-referenced proceedings.

Sincerely,

Davis Wright Tremaine LLP

Ryan M. Appel

cc: Service List

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

CROWN CASTLE FIBER LLC, *Complainant*, v. COMMONWEALTH EDISON COMPANY, *Respondent*.	Proceeding Numbers 19-169; 19-170 Bureau ID Number EB-19-MD-004; EB-19-MD-005

TO: THE COMMISSION

OPPOSITION TO RESPONDENT'S APPLICATION FOR REVIEW

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August 29, 2019

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Crown Castle Fiber LLC ("Crown Castle"), by and through undersigned counsel, and pursuant to 47 C.F.R. § 1.115(d), opposes Respondent Commonwealth Edison Company's ("ComEd") Application for Review in the above-referenced proceedings.

I. INTRODUCTION AND SUMMARY

Section 224(c) requires the Commission to regulate pole attachments where a state does not. Yet, in asking the Commission to overturn the Enforcement Bureau's Order, ComEd would have the Commission abdicate its statutory mandate to regulate pole attachments where in this case Illinois does not. It would also force the Illinois Commerce Commission ("ICC") to regulate pole attachments by telecommunications carriers to electric utility poles despite the ICC's unequivocal, filed statement that it has not adopted regulations covering, and does not have regulatory authority over, such attachments. ComEd would then use the Commission's abdication to excuse ComEd's years of abusive tactics that have delayed Crown Castle's Chicago area deployment and unjustly shifted tens of millions of dollars' worth of previously scheduled pole plant upgrades onto Crown Castle as a pre-condition of attachment. ComEd could also then continue to charge exorbitantly high rents for attachments to all of its poles, including the ones that Crown Castle paid to replace.

Crown Castle currently has multiple projects underway to deploy significant telecommunications infrastructure and services in the Chicago area. In connection with these projects, Crown Castle plans to deploy approximately 253 miles of fiber optic lines across multiple communities in the Chicago area that would be used to provide various telecommunications services, including to enterprise customers and wireless-carrier customers.[1] In deploying the fiber optic lines for these projects, Crown Castle requires attachment to more

[1] Complaint ¶ 29 (Proceeding 19-169); Complaint ¶ 26 (Proceeding 19-170).

than 20,000 ComEd poles.[2] In addition, Crown Castle requires attachment to more than 2,600 ComEd poles for its deployment of wireless facility nodes for these projects.[3] Crown Castle's projects are an important contribution to the national policy goal of prompt deployment of competitive telecommunications services and advanced wireless networks and technologies.

This case centers on the significant and on-going roadblocks ComEd has imposed on Crown Castle's network deployment. Notably, ComEd has failed to timely process hundreds of Crown Castle applications for attachment to thousands of ComEd poles, with ComEd taking far more than six months and in many cases nearly a year to process applications. Moreover, ComEd refuses to allow Crown Castle to deploy on ComEd "red tag" poles—poles that ComEd had previously scheduled to replace for reasons unrelated to Crown Castle's attachment—unless Crown Castle first pays and waits for the poles to be replaced, or on rare occasion reinforced. To date, Crown Castle has paid ComEd tens of millions of dollars for replacement and reinforcement of such poles to avoid being denied attachment. At the same time, and for many years, ComEd has required Crown Castle to pay annual attachment rates that far exceed the rates that would apply under the Commission's pole attachment rental formula. Indeed, ComEd demands annual rental for Crown Castle's wireless attachments that are more than 15 times higher than the regulated rate.

Although the ICC certified in 1978 and again in 1985 that it regulates pole attachments by cable operators, the ICC has not implemented rules or regulations governing pole attachments by telecommunications providers to electric utility poles. All of the ICC's pole attachment rules remain explicitly limited to cable television attachments. And on December 12, 2018, the ICC

[2] *Id.*

[3] *Id.*

filed an updated certification with the Commission stating that the ICC has not adopted rules governing telecommunications attachments to electric utility poles, and, therefore, does not have regulatory authority over disputes regarding such attachments (the "2018 Notice").[4] Indeed, the ICC explicitly states that "the ICC is unable to comply with the requirements of Section 224(c)(2) and (c)(3) with respect to these specific transactions or entities."[5]

In response to Crown Castle's two complaints filed in these proceedings (one addressing the denial of access (Docket 19-169) and the other ComEd's unlawful rates (Docket 19-170)), ComEd filed a Motion to Dismiss, arguing that the ICC has jurisdiction over the dispute, not the Commission. On July 15, 2019, the Enforcement Bureau ("Bureau") denied ComEd's Motion to Dismiss, rejecting ComEd's argument regarding the ICC's cable television-era certification, explaining that "[a]lthough the 1985 Certification states that the ICC 'has issued and made effective rules' implementing the state's 'regulatory authority over pole attachments,' the 2018 Notice makes clear that these rules 'do not specifically govern telecommunications companies' attachments to poles owned by electric utilities.'"[6]

In its Application for Review, ComEd presents the same arguments that were advanced in its Motion to Dismiss and correctly rejected by the Bureau. The Commission should affirm the Bureau's Order and deny ComEd's Application for Review.

Contrary to ComEd's assertions, this is not an issue of first impression by the Commission. Shortly after the Telecommunications Act of 1996 ("1996 Act") expanded Section

[4] Complaint ¶¶ 12-21 (Proceeding 19-169); Complaint ¶¶ 11-20 (Proceeding 19-170). The 2018 Notice was adopted by the ICC at an open meeting on October 25, 2018. *See* Application for Review, Exhibits D-E.

[5] Application for Review Exh. D, Oct. 25, 2018 ICC Notice at p.2.

[6] *Crown Castle Fiber LLC v. Commonwealth Edison Co.*, Proceeding Numbers 19-169; 19-170, ¶ 5 (Jul. 15, 2019) ("Bureau Order").

224 to govern telecommunications attachments, the Commission addressed the fact that most previously certified states did not have rules governing telecommunications attachments. The Commission held that although states were not required to re-certify, jurisdiction would revert to the Commission in the event of a complaint where the state, which had otherwise previously certified under Section 224(c), had not actually implemented rules and regulations governing telecommunications attachments.[7]

ComEd's arguments fail to account for the Commission's rulings, or the plain language of 47 U.S.C. § 224(c) and Section 1.1405 of the Commission's Rules, both of which require a state to have actually "issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments (including a specific methodology for such regulation which has been made publicly available in the state)."[8] ComEd's argument that the ICC's pre-1996 Act certification forever resolves the issue is incorrect and cannot be reconciled with Section 224 or the Commission's Rules.

ComEd's assertion that the ICC's pole attachment regulations are broad enough to apply to attachments made by telecommunications companies to electric utility poles also lacks merit. The ICC's regulations explicitly and unambiguously apply only to attachments made by cable television operators. There is also nothing to support ComEd's assertion that the Commission's jurisdiction over these cases would harm federalism and create uncertainty. To the contrary, if the Commission fails to exercise jurisdiction, it will fail to fulfill its statutory mandate to regulate pole attachments where a state does not, and long-standing Commission policies supporting the rapid deployment of competitive networks and new technologies.

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[7] *See infra* Part II.A.2.

[8] 47 C.F.R. § 1.1405(b)(3).

As demonstrated below, the Commission should reject ComEd's Application for Review and affirm the Bureau's Order denying ComEd's Motion to Dismiss.

II. THE BUREAU'S ORDER CORRECTLY HELD THAT THE ICC HAS NOT EXERCISED JURSIDICTION OVER TELECOMMUNICATIONS ATTACHMENTS TO ELECTRIC UTILITY POLES

ComEd premises its entire argument on the ICC's certification to the Commission, over 30 years ago, that it regulates pole attachments by cable operators, claiming this is "conclusive" evidence of the ICC's jurisdiction over telecommunications carriers' attachments. However, ComEd's argument disregards the Commission's statutory mandate to regulate pole attachments where a state does not. It also misconstrues Section 1.1405(a) of the Commission's rules, and ignores the Commission's reasonable interpretations of its own rules. In addition, ComEd's argument that the ICC's rules are broad enough to reach telecommunications attachments conflicts with the plain language of the ICC's rules, as confirmed by the ICC.

A. Section 224(c) of the Communications Act and Commission Rule 1.1405 Require More Than Certification For A State To Perfect Jurisdiction

Section 224(c) requires the Commission to regulate pole attachments where a state does not. Despite the ICC's clear and unequivocal statement that it does not regulate telecommunications attachments to electric utility poles and "is unable to comply with the requirements of Section 224(c)(2) and (c)(3),"[9] ComEd would reverse this mandate and prevent the Commission from asserting jurisdiction over this dispute.

[9] Application for Review, Exh. D, Oct. 25, 2018 ICC Notice at p.2.

1. The FCC Is Required To Regulate Pole Attachments Unless A State Has Implemented Regulations

Pursuant to Section 224(c)(1), the FCC must regulate pole attachments except "where such matters ***are regulated*** by a State."[10] To remove the Commission's mandate to regulate, the statute requires that the State actually adopt, issue, and make effective rules. Specifically, Section 224(c)(3) provides that "a State *shall not* be considered to regulate the rates, terms, and conditions for pole attachments—(A) ***unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments***. . . ."[11] Implementing the plain language of the statute, Section 1.1405 of the Commission's Rules requires a State to certify that "(1) *It regulates* rates, terms and conditions for pole attachments; . . . and (3) ***It has issued and made effective rules and regulations*** implementing the state's regulatory authority over pole attachments (***including a specific methodology for such regulation*** which has been made publicly available in the state). . . ."[12]

The current versions of Section 224 and Rule 1.1405 reflect Congressional recognition that mere "certification" by a State is inadequate. As originally enacted in 1978, Section 224(c) allowed for jurisdiction to revert to states based solely on "certification."[13] In 1984, Congress amended Section 224(c) to add, in pertinent part, that a state will not be considered to be regulating the rates, terms, and conditions for pole attachments for Section 224(c)(1) unless it has

[10] 47 U.S.C. § 224(c)(1) (emphasis added).

[11] 47 U.S.C. § 224(c)(3) (emphasis added).

[12] 47 C.F.R. § 1.1405(a)-(b) (emphasis added).

[13] PL 95–234 (HR 7442), February 21, 1978, 92 Stat 33.

issued and made effective rules and regulations.[14] The Commission explained that Section 224(c) was amended

> by adding a new paragraph Section 224(c)(3). This addition provides that a state will not be considered to be regulating the rates, terms and conditions for pole attachments for Section 224(c)(1) purposes ***unless it has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments*** and takes final action on individual complaints within the time limits specified in [Section 224].[15]

After the 1996 Act extended Section 224 to attachments by telecommunications providers, the FCC repeatedly confirmed that "Section 224(c)(3) directs that jurisdiction for pole attachments reverts to the Commission generally if the state has not issued and made effective rules implementing the state's regulatory authority over pole attachments."[16]

Based on the plain language of Section 224 of the Act and Section 1.1405 of the Commission's Rules, the FCC can release jurisdiction over Crown Castle's Pole Attachment Complaints against ComEd *only* if Illinois has issued and made effective rules and regulations governing access and the rates, terms, and conditions of attachment by telecommunications providers.[17] As the ICC has unequivocally confirmed, it has not adopted rules to regulate attachments made by telecommunications providers to poles owned by electric utilities, and

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[14] *See In the Matter of Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984,* Report and Order, MM Docket No. 84-1296, 1985 FCC LEXIS 3475, ¶ 140 (Apr. 19, 1985).

[15] *Id.* (emphasis added).

[16] *See, e.g., In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996,* CS Docket No. 97-151, 13 FCC Rcd 6777, 6781 ¶ 6 n.20 (Feb. 6, 1998); *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996,* Notice of Proposed Rulemaking, CS Docket No. 97-151, 12 FCC Rcd 11725, 11727 ¶ 5 n.13 (Aug. 12, 1997).

[17] 47 U.S.C. § 224(c)(3); 47 C.F.R. § 1.1405(a)-(b).

therefore, does not have regulatory authority over disputes regarding such attachments.[18] Because the ICC has not issued applicable regulations, jurisdiction over Crown Castle's Pole Attachment Complaints against ComEd is properly with the FCC.

ComEd assumes that the reverse preemption requirements in Section 224(c)(3) and Rule 1.1405 are satisfied here because (1) the State of Illinois has certified that it regulates pole attachments and (2) Section 7-102 of the Illinois Public Utilities Act,[19] according to ComEd, gives "the ICC authority to regulate pole attachments."[20] However, merely filing a certificate, before the 1996 Act, or possessing authority, in general, broad enough to allow regulation of attachments to an electric utility company's poles is insufficient under the language of Section 224 and Rule 1.1405.

First, contrary to ComEd's assertion, the ICC's Notice *does* effectively limit the scope of Illinois' certification. It does not withdraw the certification completely, but it tells the FCC that the certification does not extend to telecommunications attachments to electric utility poles, and critically, that the ICC cannot comply with Sections 224(c)(2) and (c)(3).

Second, merely possessing potential statutory authority over utility company facility leases does not mean the state "has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments (including a specific methodology for such regulation which has been made publicly available in the state)," as required by Section 1.1405(b)(3) of the Commission's Rules and Section 224(c) of the Act.[21]

[18] Application for Review, Exhibit D, Oct. 25, 2018 ICC Notice at pp. 1-2.

[19] 220 ILCS 5/7-102.

[20] Application for Review at 12.

[21] 47 C.F.R. § 1.1405(b)(3).

State regulatory agencies normally have broad authority over electric utility facilities, which theoretically would encompass pole attachments. For example, pole attachments in Arizona, Tennessee, and Wisconsin are regulated by the Commission.[22] Yet, each state has a statute nearly identical to Section 7-102(A) of the Illinois Public Utilities Act that requires the state's utility commission to approve a contract leasing part of a utility company's facilities.[23] Having potentially broad authority does not equate to actually regulating pole attachments. Moreover, as discussed below, the provision of the Illinois Public Utilities Act that ComEd claims grants the ICC sufficiently broad authority to potentially regulate telecommunications attachments to electric poles does not even apply because it exempts ComEd from the consent and approval requirement for its leases.[24] Thus, ComEd's argument for a broad reading of the general ICC regulation regarding leases of electric equipment lacks merit.

Section 224(c) of the Act and Section 1.1405 of the Commission's Rules require more than mere potential authority or generic certification – they require the ICC to *issue regulations* governing pole attachments by telecommunications providers. Whether the ICC has sufficiently broad regulatory authority over ComEd to hypothetically regulate is not the issue, nor is the

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[22] *States That Have Certified That They Regulate Pole Attachments*, Public Notice, DA No. 10-893, 25 FCC Rcd. 5541 (2010).

[23] Ariz. Rev. Stat. Ann. § 40-285(A) ("A public service corporation shall not sell, ***lease***, assign, mortgage or otherwise dispose of or encumber the whole or any part of its railroad, line, ***plant*** or system necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder . . . ***without first having secured from the commission an order authorizing it so to do***.") (emphasis added); Tenn. Code Ann. § 65-4-112(a) ("No ***lease*** of its ***property***, rights, or franchises, by any such public utility . . . ***shall be valid until approved by the commission***, even though power to take such action has been conferred on such public utility by the state or by any political subdivision of the state.") (emphasis added); Wisc. Stat. § 196.80(1m)(e) ("***With the consent and approval of the commission*** but not otherwise a public utility may: . . . Sell, acquire, ***lease or rent*** any public utility plant or property constituting an operating unit or system") (emphasis added).

[24] *See* Application for Review at 12, n. 22 (citing 220 ILCS 5/7-102(E)).

ICC's cable television-era certification or cable television-specific regulations sufficient to overcome this lack of regulation.

2. The Commission's Rules Establish A Procedure For When A "Certified" State Has Failed To Implement Regulations Governing Telecommunications Attachments

Contrary to ComEd's argument that the ICC's pre-1996 Act certifications forever resolve the ICC's jurisdiction over *all* pole attachments, the Commission has addressed this type of situation and created a process for addressing complaints, like Crown Castle's, filed when a state has failed to implement regulations governing telecommunications attachments. ComEd's arguments ignore or misconstrue the fact that fact twenty years ago the Commission held that it could not rely on a State's cable era certification to abdicate the Commission's responsibility to regulate pole attachments. It devised a process that put everyone on notice that unless a state actually regulates, the Commission's rules will govern.

After the 1996 Act expanded the scope of Section 224 to include mandatory access to poles and to govern attachments by telecommunications carriers, the Commission recognized that States that had previously certified regarding regulation of pole attachment rates, terms, and conditions by cable operators may not have adopted regulations governing access or telecommunications attachments. In addressing the mandatory access provisions added in 1996, the Commission stated that such States are not required to re-certify "in order to assert their jurisdiction over access."[25] But that does not mean that all states that had certified prior to the 1996 Act satisfied the Section 224 requirements to retain jurisdiction over telecommunications

[25] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection Between Local Exch. Carriers & Commercial Mobile Radio Serv. Providers*, Order on Reconsideration, CC Docket Nos. 96-98; 95-185, 14 FCC Rcd. 18049, ¶¶ 115-116 (Oct. 26, 1999) ("1999 Recon Order").

pole attachments. Rather, the Commission adopted a process that allowed an attaching party to file a complaint involving a certified State that has not adopted new regulations to govern the issues added by the 1996 Act:

> upon the filing of an access complaint with the Commission, the ***defending party or the state itself should come forward to apprise us whether the state is regulating such matters***. If so, we shall dismiss the complaint without prejudice to it being brought in the appropriate state forum***. A party seeking to show that a state regulates access issues should cite to state laws and regulations governing access and establishing a procedure for resolving access complaints in a state forum***. Especially probative will be a requirement that the relevant state authority resolve an access complaint within a set period of time following the filing of the complaint.[26]

In this case, the State has "come forward to apprise [the Commission] whether the state is regulating such matters," and the ICC said it is not regulating these matters and that it cannot comply with Sections 224(c)(2) and (c)(3).[27] Thus, Illinois' 1985 certification is not "conclusive proof" that it regulates and has implemented rules regulating telecommunications attachments. Rather, the ICC's 2018 Notice is conclusive proof that Illinois does not.

ComEd argues that the ICC has jurisdiction over Crown Castle's attachments to ComEd's poles because the ICC filed a certification, which ComEd argues then becomes "conclusive proof."[28] However, in addition to being contradicted by the Commission's Orders, discussed above, ComEd's argument inappropriately gives short shrift to the requirement of "suitable"

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[26] *Implementation of Section 703(e) of the Telecommunications Act of 1996*, First Report and Order, CC Docket Nos. 96-98; 95-185, 11 FCC Rcd 15499, ¶ 1240 (Aug. 8, 1996) (emphasis added).

[27] Application for Review Exh. D.

[28] Application for Review at 7-13.

certification.[29] Section 1.1405(b) provides that a certificate is suitable "if it has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments."[30] As demonstrated above, Congress and the Commission have recognized that a State cannot merely submit a certificate and that certificate will be accepted as binding. Section 1.1405(b) of the Rules and Section 224(c) of the Act require that the State have actually "issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments (including a specific methodology for such regulation which has been made publicly available in the state."[31]

ComEd asserts that "[t]he Order does not deny that the ICC's 1978 and 1985 certifications were 'suitable.'"[32] However, the issue is not whether the certifications were suitable in 1978 or 1985—when pole attachments applied only to cable television attachments; the issue is whether the ICC has filed a "suitable" certification to demonstrate it has exercised regulatory authority over telecommunications attachments to electric facilities. In light of the ICC's admission that its pole attachment rules do not apply to telecommunication companies' attachments to electric utility poles, the ICC clearly has not. The Enforcement Bureau Order correctly affirms that the ICC's pole attachment rules governing cable television attachments, which were the basis for the ICC's pre-1996 certifications, do not satisfy the requirements for the ICC to have a suitable certification and actually regulate the attachments at issue.[33]

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[29] Application for Review at 9 (asserting "Subsection (b) merely defines what is a 'suitable certificate,' in terms of the statutory requirements.").

[30] 47 C.F.R. § 1.1405(b).

[31] 47 C.F.R. § 1.1405(b)(3).

[32] Application for Review at 9.

[33] Enforcement Bureau Order ¶ 5.

Moreover, ComEd's heavy reliance on the second sentence in Section 1.1405(a) of the Commission's Rules ("Such certificate shall be conclusive proof of lack of jurisdiction of this Commission") ignores and misconstrues the very next sentence of the same Rule, which provides a mechanism for filing a complaint before this Commission when state has failed to adopt new rules after the 1996 Act.[34] ComEd asserts that Section 1.1405(a) provides a mechanism for when a state that has not certified.[35] But there is no such limitation in Section 1.1405(a). The rule provides that "[a] complaint alleging a denial of access shall be dismissed for lack of jurisdiction in any case where the defendant or a State offers proof that the State is regulating such access matters."[36] There is no statement that this is only in cases where the State is uncertified. Indeed, there is no limit on whether the State has certified or not. Thus, the language of Section 1.1405(a) is clearly broad enough to include complaints involving attachments in states that had certified prior to 1996. ComEd's limited reading of the Rule is not supported by the language or reality.

Even if the ICC's 2018 Notice were not definitive, ComEd has not met its burden of demonstrating that Illinois regulates telecommunications attachments to electric utility poles.[37] ComEd cites to Section 315.30 of the ICC's pole attachment rules, asserting that it applies to telecommunication companies because it generally refers to the term "pole attachments."[38] As discussed in detail below, ComEd's argument is meritless. ComEd completely ignores (a) that all other sections of the ICC's pole attachment rules expressly

[34] 47 C.F.R. § 1.1405(a).

[35] Application for Review at 11.

[36] 47 C.F.R § 1.1405(a).

[37] *Id.*

[38] Application for Review at 12-13.

reference only CATV companies and, *most importantly*, (b) the ICC's own statement to the Commission that Sections 315.10 through 315.70 apply to attachments by cable television companies and "***do not specifically govern telecommunications companies' attachments to poles owned by electric utilities***."[39]

ComEd contends that the 1999 Reconsideration Order cited by the Bureau Order referenced the "defendant's burden [to prove the state is regulating] is only in those instances where 'a state . . . has not previously certified its authority."[40] However, ComEd's assertion badly mischaracterizes and mis-quotes the 1999 Reconsideration Order. In fact, paragraph 115 of the 1999 Reconsideration Order made clear that the burden "applies to those states *that have previously certified*."[41] ComEd's quote came from a later part of the paragraph where the Commission clarified that if a state has not previously certified and later seeks to assert jurisdiction, it must go through the certification process: "However, if a state that has not previously certified its authority over rates, terms and conditions wishes to begin to assert such jurisdiction, including jurisdiction over access pursuant to section 224(f), the state must certify its jurisdiction, as required under section 224(c)(2)."[42] The relevant portion of the paragraph provides:

> we determined that the burden of informing this Commission when a state has exercised its reverse preemption authority should rest with the party seeking to rely upon such authority in defending an access complaint filed before us. Although we decline to reconsider this decision, ***we clarify that this applies to those states that have previously certified*** their regulation of rates, terms and conditions of pole attachments. Our rule does not require such states to formally re-certify in order to assert their jurisdiction over access. However, *if a state that has not previously certified its*

[39] Application for Review, Exhibit D, Oct. 25, 2018 ICC Notice at p. 2 (emphasis added).

[40] Application for Review at 11 (citing 14 FCC Rcd. 18049 at ¶ 115).

[41] 1999 Recon Order, 14 FCC Rcd. 18049 ¶ 115 (emphasis added).

[42] *Id.*

> *authority over rates, terms and conditions wishes to begin to assert such jurisdiction, including jurisdiction over access pursuant to section 224(f), the state must certify its jurisdiction, as required under section 224(c)(2).*[43]

Fundamentally, ComEd's theory of events is based on an illogical scenario in which there is a claim a State regulates even though it has never certified under Section 224(c). But that would never arise as an issue in an FCC pole complaint.

B. The ICC's Pole Attachment Rules Do Not Apply to Attachments Made by Telecommunications Companies to Electric Utility Poles.

The Bureau Order also correctly concluded that the ICC's pole attachment rules do not apply to attachments made by telecommunications providers to electric utility poles.[44] ComEd's argument to the contrary in its Application for Review is unavailing.

As the ICC unambiguously confirmed in its 2018 Notice, the ICC has not adopted any rule governing rates, terms, or conditions for attachments by telecommunications companies to poles owned by electric utilities. The ICC's pole attachment rules, which are codified in Sections 315.10 through 315.70 of Title 83 of the Illinois Administrative Code, explicitly apply only to attachments by cable television (or what it calls "CATV") companies. Section 315.10 specifically states that "[t]he purpose of this Part is to designate a presumptive methodology for computation of annual rental rates to be paid by **cable television ('CATV') companies** to electric utilities and local exchange telecommunications carriers (collectively 'regulated entities') . . . for the use of space on distribution poles for attachment of **CATV** cables and associated facilities."[45] Indeed, nearly every other section of the ICC's pole attachment rules

[43] *Id.* (emphasis added).

[44] Bureau Order ¶¶ 2, 5.

[45] 83 Ill. Adm. Code 315.10 (emphasis added).

explicitly refers only to CATV companies:

- 83 Ill. Adm. Code 315.20 ("Subject to the provisions of Section 315.30 below, an annual pole attachment rental rate included in a pole attachment agreement between a ***CATV*** company and a regulated entity. . . .") (emphasis added).
- 83 Ill. Adm. Code 315.40 ("After the 'post-construction' inspection, further inspection of ***CATV*** pole plant, at ***CATV's*** cost, is prohibited except when the regulated entity submits to the ***CATV*** operator a statistically reliable survey evidencing the fact that the ***CATV*** has failed to report more than 5% of his attachments or is in noncompliance on 5% or more of the poles to which it is attached.") (emphasis added).
- 83 Ill. Adm. Code 315.50 ("Detailed itemization for make-ready work shall be provided to each ***CATV*** operator with each billing for make-ready work.") (emphasis added).
- 83 Ill. Adm. Code 315.60 ("***CATV*** operators cannot be required in any pole attachment agreements to indemnify the electric utilities or telecommunications carriers from the negligence of electric utilities or telecommunications carriers.") (emphasis added).

None of the ICC's pole attachment rules reference attachments by *telecommunications companies* to poles owned by electric companies. Therefore, Sections 315.10 through 315.70 of Title 83 of the Illinois Administrative Code do not apply to attachments made by telecommunications companies. Indeed, that is the ICC's view, as stated in its 2018 Notice.[46]

[46] Application for Review, Exhibit D, Oct. 25, 2018 ICC Notice at p. 2.

ComEd asserts that Section 315.30 of the ICC's pole attachment rules is "broad enough to cover telecommunications companies" because the section generally references the term "pole attachments."[47] ComEd further contends that the federal definition of "pole attachment," which includes attachments made by cable operators and telecommunications companies,[48] should apply to Section 315.30 and in so-doing, sweep in telecommunications attachments.[49]

ComEd's argument regarding Section 315.30 is fundamentally flawed for four reasons. First, ComEd disregards the ICC's declaration that it "has not adopted any rules or regulations specifically governing rates, terms, and conditions for attachments by *telecommunications* companies to poles owned by electric utilities,"[50] and asks this Commission to do so as well. Just as this Commission's interpretation of its own rules is entitled to deference, the ICC's interpretation of its own rules—as not extending to telecommunications attachments to electric poles—is likewise entitled to deference.[51]

Second, ComEd's argument ignores the fact that all of the other sections of the ICC's pole attachment rules narrowly apply only to CATV companies and CATV attachments.

Third, contrary to ComEd's assertion, Section 315.30 of the ICC's Rules, at most, provides a mechanism for resolving disputes related to *CATV attachment rates* that were derived

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[47] Application for Review at 13.

[48] 47 U.S.C. 224(a)(4).

[49] Application for Review at 12-13.

[50] Application for Review, Exhibit D, Oct. 25, 2018 ICC Notice at p. 1 (emphasis added).

[51] *See, e.g., People ex rel. Madigan v. Illinois Commerce Comm'n,* 25 N.E.3d 587, 594 (Ill. 2015) ("The [ICC's] interpretation of the [Public Utility] Act is accorded deference because administrative agencies enjoy wide latitude in effectuating their statutory functions."); *Rend Lake Coll. Fed'n of Teachers, Local 3708 v. Bd. of Cmty. Coll., Dist. No. 521,* 405 N.E.2d 364, 368 (Ill. App. Ct. 5th Dist. 1980) ("[I]t is of tantamount importance that deference be given an administrative agency's own interpretation of the regulations which it has set forth.").

pursuant to Section 315.20 of the ICC's pole attachment rules. Specifically, Section 315.30 provides that in the event of a rate dispute, the petition for approval "shall be accompanied by an exhibit or exhibits showing that the rate proposed by the utility is equal to the rate resulting from the formula set forth in Section 315.20 . . ." and "[a] rate equal to the rate resulting from the formula set forth in Section 315.20 shall be presumed just and reasonable."[52] As noted above, Section 315.20 explicitly governs only rates for pole attachment agreements "between a CATV company and a regulated entity."[53] Thus, Section 315.30 at most creates a mechanism for submission of rate disputes between cable operators and utilities. Yet, Section 315.30 *does not* provide a mechanism for resolving (a) access disputes or (b) rate disputes related to attachments made by telecommunications companies.

ComEd argues that 83 Ill. Admin. Code 315.30 refers "to *all* situations '[w]here consent and approval of the Commission to a pole attachment or conduit agreement is required by Section 7-102 of the Act.'"[54] Yet, ComEd admits, as it must, that it "***is not required to file .. . leases for affirmative, advance approval***."[55] Under 220 ILCS 5/7-102(E), consent and approval is only required for leases with annual compensation of over $5,000,000, a threshold not triggered by Crown Castle's attachments.[56] Thus, consent and approval is not required, and ComEd's entire argument that the ICC's regulations are broad enough to govern pole attachment leases is premised on a section of the ICC's Rules that ComEd admits does not even apply.

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[52] 83 Ill. Adm. Code 315.30(b). Notably, this provision also creates a mechanism for submission *by the utility*—not the attaching party. *Id.* ("***the regulated entity's petition*** for consent to and approval of the agreement shall be accompanied by. . . ." (emphasis added)).

[53] 83 Ill. Adm. Code 315.20.

[54] Application for Review at 12.

[55] Application for Review at 12 n. 22 (citing 220 ILCS 5/7-102(E)) (emphasis added).

[56] 220 ILCS 5/7-102(E).

The one case ComEd cites for the scope of the ICC's authority over pole attachments does not demonstrate that the ICC regulates telecommunications pole attachments, as required for the ICC to reverse preempt. *Cable Television Co. v. ICC*, 403 N.E.2d 287 (Ill. App.2d Dist. 1980), concerned the ICC's rules governing cable television attachments. At most, the case supports the proposition that the ICC may have sufficient authority to adopt regulations, in theory, but the case does not address the more important issue of whether the ICC actually has adopted applicable regulations, as required by 47 U.S.C. § 224(c). As noted above, many state utility commissions likely have sufficiently broad authority over electric utilities to reach pole attachments, but that does not mean that those states have exercised that authority to the extent required by Section 224(c).

Finally, ComEd's argument that the federal definition of "pole attachment" should be grafted into Section 315.30 is unpersuasive. The federal definition of "pole attachment" was amended by the 1996 Act to include attachments made by telecommunications companies.[57] The ICC pole attachment rules were adopted and subsequently amended *prior* to the enactment of the 1996 Act.[58] After the 1996 Act was implemented, the ICC's pole attachment rules were not extended to attachments made by telecommunications companies. Therefore, applying the post-1996 Act federal definition of "pole attachment" to Section 315.30 would improperly amend the Illinois Rules.

[57] *See e.g.*, S. CONF. REP. 104-230, 206.

[58] The ICC's pole attachment rules were adopted in 1985 and were amended in 1994. *See e.g.*, 83 Ill. Adm. Code 315.10.

III. REQUIRING CROWN CASTLE TO FILE A COMPLAINT WITH THE ICC IN THE ABSENCE OF APPLICABLE ICC REGULATIONS WOULD BE FUTILE AND CONFLICT WITH THE PURPOSES OF SECTION 224

The FCC's precedent makes clear that the correct procedure in this case was for Crown Castle to file its complaint with the Commission, not the ICC, as ComEd's Application argues.[59] The Commission has for many years repeatedly recognized the importance of facilitating prompt deployment.[60] Forcing a party to file a complaint knowing that the ICC has no rules and lacks regulatory authority would significantly undermine the Act's and the Commission's policy goals of promoting rapid deployment of competitive telecommunications networks. For example, in 2017, the Commission adopted a 180 day "shot clock" for access pole complaints, specifically recognizing that "establishment of such a shot clock will expedite broadband deployment by resolving pole attachment access disputes in a quicker fashion."[61] The Commission recognized that "pole access complaints 'are more urgent than complaints alleging unreasonable rates, terms and conditions,' and because the only meaningful remedy for lack of pole access 'is the grant of immediate access to the requested poles,' it is crucial for the Enforcement Bureau to complete its review of pole access complaints in a timely manner."[62]

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[59] Application for Review at 13-14.

[60] *See, e.g.*, *Matter of Implementation of Section 224 of the Act; A Nat'l Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245; GN Docket No. 09-51, 26 FCC Rcd. 5240, ¶¶ 3, 6 (2011); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84; WT Docket No. 17-79, 33 FCC Rcd. 7705,¶ 1 (Aug 3. 2018).

[61] *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 32 FCC Rcd. 11128, 11132, ¶ 9 (2017).

[62] *Id.*

The procedure that ComEd claims is appropriate would allow ComEd, or any pole owner, to stymie Crown Castle's access until the conclusion of years of litigation in Illinois all to simply confirm what the ICC has already told the Commission. ComEd even admits that dismissing Crown Castle's complaint "may delay the matter's returning to the FCC."[63] As discussed above, Section 224(c) requires the Commission to regulate absent evidence of actual regulation by the State. Here, the Commission has overwhelming evidence that Illinois does not regulate telecommunications attachments to electric utility poles, and thus, Section 224(c) mandates that the Commission hear and decide Crown Castle's complaints.

As the Enforcement Bureau Order correctly explained, "granting ComEd's Motion to Dismiss would simply delay the inevitable result of jurisdiction reverting back to the Commission."[64] ComEd argues that this conclusion is incorrect because "after hearing from ComEd the ICC might conclude that it could hear the complaint."[65] ComEd provides no basis for this argument. The 2018 Notice expressly states that the ICC lacks regulatory authority over Crown Castle's attachments to ComEd's poles.[66] ComEd's theory that the ICC would second guess the 2018 Notice is purely speculation.

ComEd also attacks the 2018 Notice by stating that it "did not come from any rulemaking or other administrative proceeding, and the ICC did not invite or receive any comments." Yet, ComEd does not cite to any Illinois state law that would require the ICC to issue a clarification such as the 2018 Notice pursuant to a rulemaking or other proceeding.

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[63] Application for Review at 14.

[64] Bureau Order ¶ 5 n. 19.

[65] Application for Review at 14.

[66] Enforcement Bureau Order ¶ 5 n. 19.

IV. THE ENFORCEMENT BUREAU'S ORDER DOES NOT DISPRUPT SETTLED CERTIFICATION PRACTICE

Without providing support or explanation, ComEd argues that the Enforcement Bureau's Order "creates uncertainty," upsets "settled practice concerning the scope of a certification" and "encourages" pole attachment cases to "be first filed at the FCC, bypassing the states' opportunity to definitely rule. . . on its own law."[67] The Order does nothing of the sort.

As discussed above, the Commission made clear immediately after the 1996 Act added telecommunications attachments to the scope of Section 224 that there would be situations precisely like this case, where the State had previously certified, but having failed to implement new rules governing telecommunications attachments, jurisdiction would revert to the Commission. Thus, there is no disruption to "settled" expectations or practice.

Ultimately, ComEd's argument suggests that ComEd's interest is avoiding any regulation of its treatment of Crown Castle's pole attachments. Because the ICC has no rules governing Crown Castle's attachments to ComEd's poles, ComEd's "expectation" appears to be that it was free of any regulation. But ComEd's desire to avoid oversight is not grounds to conclude that the Commission lacks jurisdiction.

V. RE-CERTIFICATION IS NOT A RELEVANT FACTOR IN DETERMINING WHETHER A STATE HAS MET THE REQUIREMENTS SET FORTH IN SECTION 224(C).

ComEd's extensive arguments regarding the lack of "re-certification" are red herrings. According to ComEd, the lack of a federal mandate to re-certify after the 1996 Act and the fact that states generally have not re-certified after the addition of telecommunications attachments in the 1996 Act means that Illinois' original certification "has the effect of occupying the entire

[67] Application for Review at 14, 16-17.

field of pole attachment regulation."[68] ComEd's argument lacks merit. It would leave attaching entities without effective recourse and allow utilities to act without clearly necessary oversight, and it is contradicted by the Commission's evaluation of the issue, as discussed above.

Re-certification is irrelevant in determining if a State has jurisdiction over attachments made by telecommunications companies. It is a focus on form over substance. Crown Castle does not argue that the State of Illinois must re-certify to perfect its jurisdiction over pole attachments made by telecommunications companies. However, as the plain language of Section 224(c)(3)(A) and the Commission's Rules require, to perfect its jurisdiction over telecommunications attachments, the ICC must adopt rules governing telecommunications attachments or extending its current pole attachment rules to attachments made by telecommunications companies. The ICC has not done so, by its own admission.

Ultimately, the fundamental flaw in ComEd's Application is that it ignores the fact that the ICC did effectively "re-certify" with its 2018 Notice. With its 2018 Notice, the ICC informed this Commission that the ICC "has not adopted any rules or regulations specifically governing rates, terms, and conditions for attachments by telecommunications companies to poles owned by electric utilities and therefore lacks regulatory authority over attachments by telecommunications companies to poles owned by electric utilities."[69] If there is a certification that is conclusive, it is the ICC's 2018 Notice. Consequently, jurisdiction over attachments by telecommunications companies to electric utility poles reverts to the FCC. The Enforcement Bureau's Order correctly affirms this reversion.

[68] Application for Review at 16.

[69] Application for Review, Exhibit D, Oct. 25, 2018 ICC Notice at p. 1.

VI. CONCLUSION

For the foregoing reasons, the Commission should deny ComEd's Application for Review in both Proceedings 19-169 and 19-170.

Respectfully submitted,

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Date submitted: August 29, 2019

RULE 1.721(m) VERIFICATION

I have read Complainant's Opposition to Respondent's Application for Review filed by Crown Castle Fiber LLC on August 29, 2019 in the above-referenced proceeding. To the best of my knowledge, information and belief formed after reasonable inquiry, the Opposition is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. The Opposition is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2019, I caused a copy of the foregoing Opposition to Respondent's Application for Review to be served on the following (service method indicated):

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